SCOTCH LEASING SDN BHD

v.

CHEE POK CHOY & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[APPLICATION FOR EXECUTION NO: 38-165-1992]
21 FEBRUARY 2000

LAND LAW: *Sale of land - Auction - Change of auction date - Whether proper notice was given to chargor - Lapse of 6 years from last valuation of land - Whether there was a need for a fresh valuation report - Auction sale - Whether chargee could make a bid without paying deposit - Whether chargee could set off amount due under charge if it became purchaser - Whether proceeds of sale could be paid directly to chargee - Rules of the High Court 1980, O. 83 - National Land Code 1965, ss. 256, 259, 260, 261, 266, 268, 269*

On 3 September 1991, the plaintiff/chargee obtained an order for sale of the defendants'/chargors' land by way of public auction fixed to be held on 27 November 1991. However, the said auction did not take place at the said date. On 31 January 1992, the Senior Assistant Registrar ('SAR') then fixed the public auction to be held on 16 June 1992 with the following consequential orders, *ie*, that the plaintiff be entitled to bid at the auction sale without having to pay any deposit and that the plaintiff be entitled to set off the amount due under the charge. Also, that the proceeds of the auction sale to be paid directly to the plaintiff. The public auction, however, did not take place on 16 June 1992. This was because on 12 June 1992, the public auctioneer submitted a letter together with the draft proclamation of sale to the SAR for approval. Pursuant to the said proclamation of sale, the auction was fixed to be held on 13 July 1992. In any event, that did not materialise as there were no bidders.

A series of events took place which led to the plaintiff's fresh application for a date for auction and *inter alia* for the consequential orders made on 31 January 1992 to be reaffirmed. The Deputy Registrar then made an order on 18 July 1997 fixing the new auction date at 1 October 1997 with the reserve price fixed at RM460,000. The said consequential orders made on 31 January 1992 were also retained. In this instance, the defendants appealed against the said order.

Held:

[1] The SAR had on his own initiative and without any application on the part of the plaintiff altered the auction date from 16 June 1992 to 13 July 1992. The facts showed that there was no order of court varying the said auction date. Instead of sending a notice of the said auction date directly to the defendants, the SAR sent the notice to the defendants through the plaintiff's solicitors. There was no affidavit or letter from the plaintiff's solicitors to confirm that they had served a copy of the said notice to the defendants. Further, the proclamation of sale only referred to the orders dated 3 September 1991 and 31 January 1992. There was no further reference to any other order changing the auction date from 16 June 1992 to 13 July 1992.

[1a] The chargor does not abrogate all his rights to the chargee at the making of the order for sale. He is merely compelled to abide by the court's order for his property to be sold in accordance with the statutory safeguards on his interest under ss. 257 and 258 of the National Land Code 1965 ('NLC'). He is a necessary party to the application for sale and must be served with a summons or writ in the manner provided under O. 83 Rules of the High Court 1980 in respect of an application under s. 256 NLC. In respect of an application under s. 260 NLC, he must be served with a summons under s. 261(1)(c). Even after the order of sale has been made and when the auction of sale is already in progress, he still retains the right to tender payment of the amount which he owes the chargee (which may be less than the value of the land on sale) and call off the sale (s. 266 NLC), provided a bid has not been accepted. (*M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor*).

[1b] Any alteration or variation of the order dated 31 January 1992 should be done by way of a summons in chambers and served on the defendants. There is a continuous obligation on the part of the chargee each time it applies for a fresh auction date to serve the fresh application on the chargors. Following the decision of *M & J Frozen Food Sdn Bhd, supra*, the public auction held on 13 July 1992 was *ultra vires* the NLC.

[2] The auction date fixed at 1 October 1997 was based on the old valuation report. The plaintiff ought to have obtained a fresh valuation report since there was a lapse of at least 6 years from the last valuation of the said land. Thus, the SAR could only fix the reserve price at RM460,000 which was the last reserve price fixed. A fresh valuation report would

be an indicator for the general public to know the present worth of the said land and the bidders could make their bids based on the said report and thereby push the price up to its present worth.

[3] The issue as to the reserve price of the said land was important as the plaintiff was also permitted to bid or set off the amount due to it. As a result of that collateral advantage sought and obtained by the plaintiff, it could be assumed that the plaintiff would try and keep the reserve price as low as possible so that it could set off the sums due and become the purchaser without paying any additional sum.

[4] The order for sale confers on the chargee only a statutory right to a judicial sale. The chargee cannot apply for or obtain any collateral advantage or inherent benefit. The right to the chargee to bid is given expressly by s. 259(2)(a) NLC. Other than this right, no other right is conferred upon a chargee. Further, the words, "may contain such other directions with respect to the sale" in s. 257(2) NLC gives wide powers to the court. However, such directions must be lawful directions and not contravene any of the express provisions of the NLC.

[5] The orders of the court made on 3 September 1991 and 31 January 1992 were contrary to the principle of set off and in breach of ss. 259(3), 268 and 269 NLC. The principle of set off can only arise if the NLC expressly stipulates that the purchase price by the successful bidder at the public auction be paid directly to the chargee. The NLC, however, expressly stipulates that all payments of the purchase price be paid to the officer of the court [s. 259(3) NLC]. Therefore, the chargee cannot stipulate any mode of payment other than that as spelt out in the NLC. All payments of the purchase price must be paid to the officer of the court and not to the chargee.

[6] The orders of the court enabling the plaintiff to bid at the auction without the deposit and to set off the amount due under the charge were contrary to s. 266 NLC. Further, the rights afforded to the defendants had been taken away. By s. 266, the chargor may stop the sale by tendering the full amount due under the charge before the conclusion of the sale. The sale is concluded when the purchase price is paid in full.

[7] Section 257(1)(a) NLC requires the sale to be by public auction. By allowing the plaintiff to bid without paying any deposit, the plaintiff would have an overall control of the auction. Such provision would render the public auction a sham. Further, the plaintiff would be able to control the bid and depress the price so as to take advantage of the collateral right conferred upon it.

[7a] If the plaintiff did bid and set off the amount, it might not be able to receive the certificate of sale issued by the officers of the court. Any certificate of sale issued by the officers of the court without receiving the full amount of the purchase price is contrary to s. 259(3) NLC. The certificate issued by the SAR would be *ultra vires* the statutory provision of the NLC and the title would be unlawfully acquired.

[Appeal allowed with costs; order of SAR dated 18 July 1997 set aside.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd & Anor v. Devlepment & Realtor Sdn Bhd [1992] 2 CLJ 1175 ***(refd)***

Badiaddin b Mohd Mahidin @ Rosli b Mohidin & Anor v. Arab Malaysian Finance Berhad [1998] 2 CLJ 75 ***(refd)***

Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 ***(refd)***

Kimlin Housing Development Sdn Bhd (Penerima dan Pengurus dilantik) (dalam liquidasi) v. Bank Bumiputra Malaysia Bhd & 3 Ors [1997] 3 CLJ 274 ***(refd)***

Malayan United Finance Bhd v. Adsonii (M) Sdn Bhd [1990] 2 CLJ 254 ***(refd)***

M&J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 ***(refd)***

NKM Properties Sdn Bhd v. Rakyat First Merchant Bankers Bhd [1992] 3 CLJ 1680 ***(refd)***

J Raju v. Kwong Yik Bank Bhd & Anor [1994] 2 CLJ 695 ***(refd)***

Legislation referred to:

National Land Code 1965, ss. 253, 254, 255, 256, 257(1)(a), (b), (c), (d), (2), 258, 259(2)(a), (3)(a), 260, 261, 262, 263 264, 265, 266, 267, 268, 269

For the plaintiff/chargee - M Thiruchelvasegaram; M/s Syarikat M. Segaram
For the defendants/chargors - Teh Tse Yee; M/s TY Teh & Partners

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

The Appeal

On 27 June 1997 the plaintiff applied by way of a summons to the learned Senior Assistant Registrar (SAR) (encl. 30) for the following orders, namely, that:

(1) a fresh auction date be fixed;

(2) one Anthony Samy a/l Savarimuthu of Abros Enterprise be appointed as a fresh auctioneer;

(3) the reserve price be fixed at RM414,000 or at such sum as the Court felt as fair and proper;

(4) all other orders given on 31 January 1992 (at an earlier auction) save those applied for herein, be reaffirmed;

(5) the defendants be ordered to pay the costs;

(6) there be liberty to apply; and

(7) such further orders be given as the court deems fit and proper.

After hearing full arguments and after reserving judgment the learned SAR made an order on 18 July 1997 whereby he fixed the fresh auction date to 1 October 1997 and fixed the reserve price at RM460,000 as stated in the valuation report and gave the order in terms in respect of the rest of the orders as prayed for. Dissatisfied with that decision the defendants appealed.

Chronology Of Events

As this case has a long and chequered history, it is necessary to narrate the chronology of events leading to this appeal.

On 3 September 1991 Anuar J (as he then was) made an order, *inter alia*, upon the application of the plaintiff/chargee, to sell the land held under GM 213 Lot No. 3269 in the Mukim of Pedah, Daerah Jerantut ('the land'), by public auction which was fixed to be held on 27 November 1991. However, it did not take place on the said date. Subsequently, pursuant to directions obtained by the plaintiff/chargee on 31 January 1992 the learned SAR then fixed the public auction to be held on 16 June 1992 and made further orders *inter alia* that:

(a) the plaintiff/chargee be at liberty to bid at the sale without having to pay any deposit whatsoever and in the event the plaintiff became the purchaser, the plaintiff should be entitled to set off the sum due or owing to it against the purchase price and in the event the successful purchaser was other than the plaintiff, then the balance of the proceeds of sale be paid directly to the plaintiff; and

(b) the proper authorities do register the name of the purchaser.

However the public auction fixed for 16 June 1992 did not take place because on 12 June 1992 the public auctioneer, one Yeong Kim Fatt, submitted a letter together with the draft proclamation of sale to the learned SAR for approval and pursuant to the said proclamation of sale the said auction was to be held on 13 July 1992. The said proclamation of sale made reference to the initial

order of Anuar J made on 3 September 1991 and to the subsequent directions obtained on 31 January 1992. I have checked the court file and note that encl. 3 is the order dated 31 January 1992 and it specifically refers to the auction date as fixed on 16 June 1992 and the reserve price being fixed at RM460,000 with the auctioner being the said Yeong Kim Fatt. There is no order setting aside the earlier order and direction dated 31 January 1992 which had fixed the auction date as at 12 June 1992. I note that there is a letter from the learned SAR dated 4 June 1992 and addressed to the said Yeong Kim Fatt informing him that the auction has been fixed to be heard on 13 July 1992. There was a chop affixed to the learned SAR's letter dated 4 June 1992 which states as follows:

Dikeluarkan pada 12.6.92

By this I presume that the learned SAR had, on his own volition and without any application on the part of the chargee arbitrarily fixed the auction date to 13 July 1992. What is most surprising is that the learned SAR had purportedly sent a letter also dated 4 June 1992 addressed to the 1st chargor and to the four others (melalui peguam plaintif). But more on this later. In any case the auction fixed for 13 July 1992 also did not materialise, as there were no bidders. On 25 July 1992 the plaintiff filed a fresh application (encl. 14), set for hearing on 17 September 1992 to fix a new date for the auction. The proclamation of sale in respect of the auction held on 13 July 1992 as annexed as an exhibit and the said proclamation of sale specifically only referred to the orders dated 3 September 1991 and 31 January 1992. There was no mention of any other order fixing the date of auction to 13 July 1992. Even on this application the plaintiff had again arbitrarily and without the benefit of any fresh valuation report reduced the reserve price to RM414,000. However, on 17 September 1992, Anuar J who heard encl. 14 set aside his earlier order for sale granted on 3 September 1991 on the ground that as the said land was held under EMR title, the High Court had no jurisdiction to order foreclosure of the said land. The plaintiff/chargee appealed to the then Supreme Court against this decision of Anuar J.

In the meantime the defendants/chargors commenced a civil suit in the High Court at Kuala Lumpur by way of Suit No. D4-22-49-93 (the D4 suit) against the plaintiff/chargee to declare the charge as null and void. However, on 14 December 1996 the then Supreme Court allowed the plaintiff's/chargee's appeal and restored the earlier order of Anuar J made on 3 September 1991. The plaintiff then made a fresh application for a date for auction and the Deputy Registrar made an order on 18 July 1997 fixing 1 October 1997 as the new auction date with the reserve price fixed at RM460,000 and the orders made on 31 January 1992 were also retained. The defendants/chargors then

filed an appeal to the judge in chambers (encl. 35) against the order made by the Deputy Registrar on 18 July 1997. This appeal before me is against that order.

In the meantime, on 14 August 1997 the defendants obtained an injunctive order in the D4 suit whereby the plaintiff was restrained from proceeding with the foreclosure proceedings or public auction in respect of the orders dated 3 September 1991 and 31 January 1992. However, on 16 September 1999 the said injunctive order lapsed because the D4 suit was dismissed. The defendants have appealed against that decision. Consequent to that on 2 November 1999 the Deputy Registrar made an order that the public auction was to be held on 22 December 1999. The orders made on 31 January 1992 and on 18 July 1997 were also retained. The proclamation of sale of the auction to be held on 22 December 1999 referred to the orders made on 3 September 1991, 31 January 1992, 18 July 1997 and 2 November 1999. However, the public auction fixed on 22 December 1999 was voluntarily called off by the plaintiff/chargee.

Findings Of The Court

Variation Of Auction Date Without Order Of Court

It is a fact that the valuation report was in fact completed and sent to the plaintiff on 19 November 1991. Whilst the first public auction was fixed on 27 November 1991, it did not however take place. It was then subsequently fixed by an order of court dated 31 January 1992 to 16 June 1992. Again the said auction did not proceed on the said date. It is important to note that the learned SAR had on his own initiative and without any application, and merely by way of a letter dated 12 June 1992 altered the auction date from 16 June 1992 to 13 July 1992. As I said when dealing with the facts of the case, I had checked through the entire court file and can confirm that there was no order of court varying the auction date fixed on 16 June 1992 to 13 July 1992. Again it is most surprising that instead of sending a notice of the said auction date directly to the defendants, the learned SAR had thought it proper to send such notice to the defendants through the plaintiff's solicitors. There is no affidavit or letter from the plaintiff's solicitors to confirm that they had indeed served a copy of the said notice to all the five defendants. It is also pertinent to note that the proclamation of sale only referred to the orders dated 3 September 1991 and 31 January 1992 and there was no further reference to any other order changing the auction date from 16 June 1992 to 13 July 1992. It is important to remember why it is necessary to give proper notice to the chargors. In *M&J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14 Wan Yahya SCJ said at p. 22 as follows:

> The chargor does not abrogate all his rights to the chargee at the making of the order for sale. He is merely compelled to abide by the Court's order for his property to be sold in accordance with the statutory safeguards on his interest as provided under ss. 257 and 258 of the NLC. He is a necessary party to the application for sale and must be served with a summons or writ in the manner provided under O. 83 of the Rules of the High Court 1980 in respect of an application under s. 256, and, with a summons as provided under s. 261(1)(c) of the NLC in respect of an application under s. 260 of the NLC. Even after the order of sale has been made and when the auction sale is already in progress, but before a bid has been accepted, he still retains the right to tender payment of the amount which he owes the chargee (which may be less than the value of the land on sale) and call off the sale – s. 266 of the NLC. The exercise of such rights do not appear to us to be consistent with a proprietor who has surrendered absolutely his rights over the land to another.

It is therefore very necessary that any alteration or variation of the order dated 31 January 1992 by changing the date of the auction be done by way of a summons in chambers which must be served on the defendants/chargors. That there was a continuous obligation on the part of the chargee each time it applies for a fresh auction date to serve the fresh application on the chargors was expressly emphasised by Wan Yahya SCJ in *J Raju v. Kwong Yik Bank Bhd & Anor* [1994] 2 CLJ 695 SC at p. 699. His Lordship said as follows:

> The chargor's first complaint is that as he was not notified of the date of the auction sale, he was deprived from exercising his right to redeem the property – a right which was open to him until the fall of the hammer. The requirement to serve a copy of the order of the court on the chargor is provided initially by s. 258(1)(a) of the NLC. The provision in s. 259(2)(c) as regards subsequent sale however was silent on this particular requirement although there is a specific requirement for the sale to be publicly advertised in the same manner as previously directed. To our minds, the mere omission by the legislature to mention a specific procedure will not detract from the principle that such direction by an officer of the court has to be exercised judiciously after giving the parties the opportunity of being heard.

It is my judgment therefore that the public auction held on 13 July 1992 was *ultra vires* the NLC following the decision of the *M&J Frozen Food* wherein Wan Yahya SCJ said at p. 23 as follows:

> We consider any variation of the order of sale or the terms and conditions made thereunder in the absence of and without the service of the required notice to the chargor is *ultra vires* the authority to sell under the NLC. Therefore we would, in answer to the second issue raised, say that as the alteration of the completion date was made without giving notice to the chargor, the subsequent order made by the SAR was void as being *ultra vires* the NLC.

It is surprising that with this clear breach being so obvious the plaintiff's legal advisors did not see the futility of pursuing further with the public auction. The conduct of the plaintiff and its legal advisor brings to mind the words of Wan Yahya SCJ in *M&J Frozen Food*. This is what his Lordship said at p. 24:

> Under ss. 258 and 261, the chargor is not only given the opportunity to show cause as to why his property should not be sold but also to participate in the deliberation on matters affecting his interest, such as the reserve price, the time, venue and conditions of sale. Over and above this, the SAR appears to have completely ignored the subsequent order setting aside the date of extension as well as the various contentious applications, objections and dissentious communications between the parties. The purchaser, on the other hand, in spite of his awareness of the contentious situation and the subsequent order setting aside the extension date, unheedingly went on to apply and obtain the certificate under s. 259(3) of the NLC and subsequently to register the property.
>
> We are unable to say whether this *faux pas* was tainted with *mala fides* and so describe it as a fraud but we would certainly conclude this conduct as being a serious impropriety or, in the words of Walsh J in the Australia's High Court Case of *Forsyth & Anor v. Blundell & Anor* [1973] 129 CLJ 477, 'conduct which amounts to a reckless sacrificing of the interest of the mortgagor'.

Need For A Fresh Valuation Report

The learned SAR fixed the reserve price at RM460,000 on 31 January 1992 based on the valuation report which was enclosed with a covering letter dated 19 November 1991 although the valuation report was not dated. This was based on the assumption that the public auction would be held on 16 June 1992. Subsequently when the chargee applied on 27 June 1997 to fix the auction date as at 1 October 1997 it utilised the same old valuation report. I am of the view that the plaintiff/chargee ought to have obtained a fresh valuation report more so after a lapse of at least 6 years since the last valuation of the said land. I am fortified in holding this view because of what Wan Yahya SCJ said in *J Raju v. Kwong Yik Bank Bhd* in that where even after a lapse of one year and nine months since the last valuation report his Lordship found it necessary to have a fresh valuation report when seeking a subsequent order for sale because he was of the view that "during this period there could be either an appreciation or depreciation of the property in respect of which value, the chargor was entitled to be heard". In the present case surely after such a long lapse of time it was very necessary for the plaintiff/chargee to have obtained a fresh valuation report more so when the plaintiff/chargee itself was given the liberty to bid. In order to prevent any suggestion of collusion on the part of the plaintiff/chargee and in order to maintain total impartiality a fresh valuation report ought to have been obtained. In the case before me

the plaintiff/chargee had in fact even arbitrarily reduced the value from RM460,000 to RM414,000. At this stage it is necessary for me to consider the impact of another decision of the then Supreme Court in *NKM Properties Sdn Bhd v. Rakyat First Merchant Bankers Bhd* [1992] 2 MLJ 349. Unfortunately this was not referred to the Supreme Court in *J Raju v. Kwong Yik Bank Bhd*. However, I am bound by the decision of the highest court in the land. Eusoff Chin SCJ (as his Lordship then was) said in *NKM Properties Sdn Bhd* at p. 353 as follows:

> Section 259(2)(c) of the Code is expressed in clear language. It states that 'in the absence of any bid at or above the reserve price' the registrar shall withdraw the land from the sale, and direct that the land be put up for auction at a subsequent date 'either at the same or at a reduced reserve price'. We are of the view that the 'same' reserve price referred to here, is the reserve price at the latest sale at which there had been no bidder. If that happens to be the tenth auction at which there had been no bidder, then the word 'same' refers to the reserve price at the tenth auction. The word 'same' cannot relate to the first to the ninth auctions which had been unsuccessful. Parliament, in legislating this provision, must have been aware of the futility of increasing the reserve price above that of the latest auction at which there was no bidder. At an auction sale the bid must start at or above the reserve price. It is logical, therefore, that the reserve price at the subsequent auction should either be at the same reserve price as the last unsuccessful auction, or at a reduced reserve price. It may be true that when the next auction date is fixed after a long lapse of time, the market value of the land may have increased to beyond the reserve price fixed at the last auction. If that is so, the law requires that the reserve price fixed for the next auction cannot be above the reserve price for the last auction. It is then left to the bidders to push the price up when they make their bids. It must be borne in mine that where the language of the law is clear, the duty of the court is to interpret what the law is, and not what it should be.

Therefore in the present case the learned SAR could only fix the reserve price at RM460,000 which was the last reserve price fixed. However, the fresh valuation report would be an indicator for the general public to know the present worth of the said land, and as guided by the then Supreme Court in *NKM Properties Sdn Bhd*, the bidders could make their bids based on the said report and thereby push the price up to its present worth. The need to have a fresh valuation report was also emphasised by Edgar Joseph J (as he then was) in *Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd* [1992] 2 CLJ 1175; [1992] 2 MLJ 504. His Lordship held that a chargee in exercising the power to sell under the NLC owed a duty to a chargor to take reasonable care to obtain the true market value of the land at the date of the sale. His Lordship further went on to hold that such a duty flowed from equity's recognition that a chargor has an interest in the surplus, if any, arising

from the sale. It was his further view that whilst a sale at an undervalue was not automatically liable to be set aside, but the undervalue might be so gross as to indicate fraud or want of proper care. Further, it is also necessary for the court to take judicial notice of the fact that there has been a sharp increase in the price of land throughout the country.

The issue as to the reserve price of the said land also takes importance as the plaintiff/chargee is also permitted to bid or set off the amount due to it. It must be noted that as a result of this collateral advantage sought and obtained by the plaintiff/chargee, it is natural to assume that the plaintiff/chargee would try and keep the reserve price as low as possible so that it could set off the sums due and become the purchaser without paying any additional sum. On this ground too I find for the defendants.

Can The Plaintiff/Chargee Make A Bid Without Paying Any Deposit?

On 3 September 1991 Anuar J only made *inter alia* an order that the plaintiff/chargee may be at liberty to bid at the sale and to set off the amount due to the plaintiff/chargee under the said charge against the purchase price. His Lordship never made an order for the plaintiff/chargee to bid at the sale without having to pay any deposit whatsoever. However on 31 January 1992 on the application of the plaintiff/chargee the learned SAR made an order, *inter alia*, that the plaintiff/chargee be at liberty to bid at the sale without having to pay any deposit whatsoever and in the event the plaintiff became the purchaser, the plaintiff/chargee should be entitled to set off the sum due or owing to it against the purchase price and that in the event the successful purchaser was other than the plaintiff, the balance of the proceeds of sale be paid directly to the plaintiff/chargee. It is necessary to reproduce the terms and conditions of the proclamation of sale in respect of the public auction to be held on 13 July 1992 and 22 December 1999. They read as follows:

> All intending bidders are required to deposit with the Senior Assistant Registrar, High Court, Kuala Lumpur 10% of the fixed reserve price for the said property by bank draft in favour of the Senior Assistant Registrar, High Court, Kuala Lumpur prior to the auction sale.

When a chargee applies for sale of land by public auction he does so under ss. 253 – 269 of the NLC. The order for sale confers on the chargee only a statutory right to a judicial sale. The point that needs emphasis is that, the remedy of the chargee under the NLC is a special remedy (see *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332; [1994] 1 MLJ 119). Apart from the statutory right to a judicial sale, the chargee cannot apply for or obtain any collateral advantage or inherent benefit. Any collateral advantage or inherent benefit sought is contrary to the remedy provided by the sale of the land and the rights granted to the chargee. The right to the chargee to bid is in fact

given expressly by s. 259(2)(a) of the NLC. Other than this right, no other right is conferred by being a chargee. Further it must also be emphasised that the words "may contain such other directions with respect to the sale" as contained in s. 257(2) of the NLC gives wide powers to the court. However, such directions must be lawful directions and not contravene any of the express provisions of the NLC. It is my judgment that part of the orders made on 3 September 1991 and on 31 January 1992, namely, that the plaintiff/chargee be at liberty to bid at the sale without having to pay any deposit whatsoever and in the event the plaintiff/chargee becomes the purchaser, then the plaintiff/chargee shall be entitled to set off the sum due or owing to it against the purchase price and in the event the successful purchaser is someone other than the plaintiff, then the balance of the proceeds of sale be paid directly to the plaintiff, were in fact orders made contrary to the principle of set off and in breach of ss. 259(3), 268 and 269 of the NLC. The principle of set off can in my view only arise if the NLC expressly stipulates that the purchase price by the successful bidder at the public auction be paid directly to the chargee. In fact the NLC expressly stipulates that all payments in respect of the purchase price be paid to the officer of the court. It is my judgment that a chargee ought not to interfere in the conduct of the sale and that the chargee's role must be minimal. The chargee cannot therefore stipulate any mode of payment other than as spelt out in the NLC. All payments of the purchase price must be paid to the officer of the court and not to the chargee. In fact s. 259(3) expressly provides that upon payment of the full amount of the purchase price to the officer conducting the public auction, the successful purchaser shall be entitled to receive from him:

(i) a certificate in Form 16F of the NLC; and

(ii) the issue document of title if the same had been deposited into court.

Section 259(3)(a) of the NLC also provides that a certificate in Form 16F be registrable as if it was an instrument of dealing. A certificate in Form 16F must be signed by the officer of the court and he also acknowledges that he has received the full amount of the purchase price. Section 268 provides how the purchase price received is to be utilised and sets out the order for payment. Section 269 of the NLC provides that the receipt in writing by the officer of the court to whom any purchase money is paid shall be a sufficient discharge thereof to the purchaser. The purchaser is duty bound to ensure that he pays the full amount of the purchase price to the officer of the court and not to any other person. It is my judgment therefore that the orders of the court made on 3 September 1991 and 31 January 1992 and retained by subsequent orders made on 18 July 1997 and 2 November 1999 were made contrary to the express provisions of the NLC.

The provisions of the NLC setting out the rights and remedies of parties under a statutory charge over land comprised in Part XVI are exhaustive and exclusive and any attempt at contracting out of those rights, unless expressly provided for in the NLC, would be void as being contrary to public policy (see the decision of the Supreme Court in *Kimlin Housing Development Sdn Bhd (Penerima dan Pengurus dilantik) (dalam liquidasi) v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274; [1997] 3 AMR 2361 at 2383. The orders of the court enabling the plaintiff/chargee to bid at the auction without the deposit and to set off the amount due under the charge are contrary to s. 266 of the NLC. Further the rights afforded to the chargor had been taken away. By s. 266, any chargor, regardless of the reason for the order for sale, may stop the sale, by tendering the full amount due under the charge, before the conclusion of the sale, including accrued interest, and an amount to cover the expenses. The sale is concluded when the purchase price is paid in full (see *M&J Frozen Food Sdn Bhd*). Section 257(1)(a) of the NLC requires the sale to be by public auction. By allowing the chargee to bid without paying any deposit, the chargee has an overall control of the auction. Such provision would render the public auction a mere sham. Further, the chargee would be able to control the bid and depress the price so as to take advantage of the collateral right conferred on it. If the chargee insists on the terms of the order made whereby the chargee is entitled to bid and set off the amount, the chargee in the event of being the purchaser, may not be able to get the certificate of sale from the officers of the court. Any certificate of sale issued by the officers of the court without receiving the full amount of the purchase price is contrary to s. 259(3) of the NLC. The certificate issued by the learned SAR would be *ultra vires* the statutory provision of the NLC and the title would be unlawfully acquired. In *M&J Frozen Food Sdn Bhd*, Wan Yahya SCJ said at p. 24:

> In any event, we are satisfied that the certificate issued by the SAR was *ultra vires* the statutory provisions of the NLC and the title was unlawfully acquired by the purchaser. This finding by itself would have rendered the title of the purchaser defeasible under para (c) of s. 340(2) of the NLC …

The order to set off the purchase price against the amount due on the charge was one of the issues raised in *J Raju v. Kwong Yik Bank Bhd*. It is unfortunate that the validity of the order itself was not raised by the parties and therefore not considered by the court particularly bearing in mind that such an order is in direct contravention of the NLC which requires the full purchase price to be paid to the officer of the court in order to enable the officer of the court to issue the certificate of title.

Does This Court Have The Right To Declare Invalid The Orders Of Court Made On 3 September 1991 And On 31 January 1992?

In *Badiaddin b Mohd Mahidin @ Rosli b Mohidin & Anor v. Arab Malaysian Finance Berhad* [1998] 2 CLJ 75; [1998] 1 MLJ 393 the Federal Court held that a court has no jurisdiction to make any order contrary to the express provisions of the NLC. The Federal Court further held that as a general rule, orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed. However, it is well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal. It is clear in light of the principles established by high authority that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist. The Federal Court further held that the procedural branch of the broad and flexible doctrine of estoppel known as *res judicata* finds no place in such a circumstance. Neither has the *functus officio* theory any role to play in the case.

The order to bid without paying the deposit and to set off the amount under the charge is a consequential order pursuant to an order for sale. The mandatory orders which the court must make when it orders sale of land are those that are set out under s. 257(1)(a), (b), (c) and (d) of the NLC. The principle of *functus officio* cannot possibly apply to consequential orders. In *Malayan United Finance Bhd v. Adsonii (M) Sdn Bhd* [1990] 2 CLJ 254 Edgar Joseph Jr J (as he then was) in holding that the learned SAR had jurisdiction to make an order, consequential to the order for sale made under s. 256 of the NLC, that the chargee be permitted to bid at the auction, observed at p. 255 that:

> ... The principle of *functus officio* cannot possibly apply to consequential orders.

It was the plaintiff's case that since the Supreme Court had allowed the plaintiff's/chargee's appeal and restored Anuar J's earlier order made on 3 September 1991, the Supreme Court had therefore confirmed Anuar J's order dated 3 September 1991. Anuar J on 17 September 1992 set aside his earlier order made on 3 September 1991 on the basis that he had no jurisdiction to

hear matters involving land held under land office title or EMR title. The Supreme Court held that the parties had waived the issue of jurisdiction by submitting before Anuar J and that therefore Anuar J ought not to have set aside his own judgment. It was on this score that they restored the earlier order of Anuar J made on 3 September 1991. It is wholly erroneous and misleading to state that the Supreme Court had confirmed the order of Anuar J made on 3 September 1991. The issues raised herein were never raised before nor considered by the Supreme Court. It must be noted that the defendants/chargors are not seeking to set aside the order for sale but only seeking to set aside certain consequential orders made thereon. Having considered all issues raised it is my judgment that this appeal ought to be allowed with costs. I therefore hereby set aside the order of the learned SAR dated 18 July 1997. Enclosure 30 therefore stands dismissed with costs.